

December 1956

Municipal Corporations--Duty to Remove Snow and Ice from Sidewalks--Liability of Abutting Owners and Occupants

I. A. P. Jr.

West Virginia University College of Law

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Recommended Citation

I. A. P. Jr., *Municipal Corporations--Duty to Remove Snow and Ice from Sidewalks--Liability of Abutting Owners and Occupants*, 59 W. Va. L. Rev. (1956).

Available at: <https://researchrepository.wvu.edu/wvlr/vol59/iss1/11>

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to surrender the premises and equipment to *C* was entirely consistent with the interest which *C* still had in the term. True, the equipment and machinery had been removed long before the lease expired, but construing the instrument as of the time when the lease was made, it appears that the court was correct in holding it to be a sublease.

L. L. P.

MUNICIPAL CORPORATIONS—DUTY TO REMOVE SNOW AND ICE FROM SIDEWALKS—LIABILITY OF ABUTTING OWNERS AND OCCUPANTS.—Action by a pedestrian against a city, the owner of a building, and a tenant of the building for personal injuries suffered in a fall on an icy sidewalk along the side of the building. The defendants demurred to the declaration separately. The tenant's demurrer was sustained while the demurrers of the owner and city were overruled. *Held*, that under a valid ordinance requiring the owner and occupant to remove snow and ice from the sidewalks fronting the premises, the owner who occupied a part of the upper floor as an office to which people using the sidewalk along the side of the building had access, was liable for failure to remove snow and ice as required. The tenant was not liable for failure to comply with the ordinance. The city was liable under W. VA. CODE c. 17, art. 10, § 17 (Michie 1955), for permitting the sidewalks to remain in a state of disrepair. Rulings affirmed. *Barniak v. Grossman*, 93 S.E.2d 49 (W. Va. 1956).

Under common law, generally a municipality was liable for injuries resulting from disrepair of streets and sidewalks. COOLEY, HANDBOOK OF THE LAW OF MUNICIPAL CORPORATIONS 387 (1914). See, e.g., *Childers v. Deschamps*, 87 Mont. 505, 290 Pac. 261 (1930). This rule remains unchanged, unless the state has relieved the municipal corporation of such responsibility. *Wilson v. City of Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780 (1882). The West Virginia legislature has reaffirmed the common law liability in cases where the municipal corporation, by its own charter, is required to keep streets and sidewalks in repair. W. VA. CODE c. 17, art. 10, § 17, *supra*. For further comment on the liability of municipal corporations in West Virginia, see Note, 53 W. VA. L. REV. 89 (1951).

The heart of this case, and a highly controversial point, concerns the civil liability of the property owners and occupants for failure to remove free fallen snow from sidewalks as required by an ordi-

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nance. Under common law, the failure on the part of abutting property owners and occupants to abate such a hazard as this has never been a ground for damages resulting from the inaction. Courts have reasoned that free fallen snow is a hazard created by nature and the owners and occupants are under no duty to prevent or correct natural hazards. 6 McQUILLAN, MUNICIPAL CORPORATIONS § 22.12 (3d ed. 1949).

However, the West Virginia court has placed liability for these injuries squarely on the property owners and occupants, on the basis of snow and ice removal ordinances, by holding that "violation of an ordinance is prima facie actionable negligence when it is the proximate cause of an injury." *Barniak v. Grossman*, *supra*. The court in the *Barniak* case relied on *Rich v. Rosenshine*, 131 W. Va. 30, 45 S.E.2d 499 (1947), which involved a similar set of facts. The *Rich* case was the first of this nature and was followed by *Morris v. City of Wheeling*, 82 S.E.2d 536 (W. Va. 1954). The liability of abutting owners and occupants was in the nature of dictum in the *Morris* case, since the jury found no negligence by the property owner. These cases, in construing the ordinances, therefore change the existing common law rule.

Municipal ordinances must be based on a statute to be given judicial notice by the courts. *Boylard v. City of Parkersburg*, 78 W. Va. 749, 90 S.E. 347 (1916). The intent of the statute or charter of incorporation, giving the municipal corporation the authority to pass ordinances, must be followed, *i.e.*, it must give the authority to annex civil liability. BISHOP, COMMENTARIES ON THE LAW OF CRIMES § 22 (2d ed. 1883); *Heeney v. Sprague*, 11 R.I. 456, 23 Am. Rep. 502 (1877). The charter of incorporation of the city of Fairmont, which gives it the authority to pass this ordinance, also gives it the power to impose a penalty for its violation, but nowhere in this authority has it been given the right to create civil liability for failure to comply with the ordinance. W. Va. Acts 1919, c. 22, §§ 5, 73, 74, and 152. *Quaere*, has this authority been exceeded?

The principal case, as well as the *Rich* case, *supra*, cited numerous West Virginia cases as authority for the proposition that violation of an ordinance is prima facie actionable negligence. However, none of those cited involved snow and ice removal ordinances but were concerned with dangerous instrumentalities as affecting a specified group; *e.g.*, automobiles, machinery, minimum age of employment, etc.

Who did the legislature, in giving this authority, intend to protect—the public as such or the public as composed of individuals? The breach of a duty, imposed by an ordinance, which is owed to individuals gives rise to civil liability, but this is not true where the ordinance is meant to protect the public in general. The court in the principal case failed to differentiate between these two concepts, which in the writer's opinion is of paramount importance. The majority of cases in the United States hold that the duty is owed to the municipal corporation and that the abutting owners and occupants cannot be made liable to individuals for injuries as a result of failure to comply with the ordinance. For an accumulation of these cases, see Annot. 24 A.L.R. 387 (1923).

The West Virginia Supreme Court of Appeals, by creating this new liability, has done that which few other courts of our land have deemed necessary. As our country grows and society becomes more complex, certain steps need to be taken to insure the safety of the public against injuries of this nature. The desirable attributes of these measures must be weighed against the burdens they create, and the burden of constant surveillance or increased liability insurance on the owners and occupants may greatly outweigh the benefits so gained.

I. A. P., Jr.

NUISANCE—AESTHETIC GROUNDS HELD VALID FOR INJUNCTIVE RELIEF AGAINST LAWFUL BUSINESS.—*Ds* operated and maintained a used automobile sales business located on their land, outside the corporate limits of a city, not subject to zoning regulations or restrictive covenants; situated, however, across a major highway from a theretofore exclusively residential area within the corporate limits. *Ps* sued to enjoin *Ds* on the grounds that the business constituted a nuisance *per accidens* or in fact, because of excessive lighting, noise, unsightliness, and diminution of value of *Ps*' property. Held, affirming the circuit court's decree, that *Ds* shall remove from their land all automobiles, trucks, light poles, wires, lights, equipment, installations and structures used by them in the conduct of the used car business. *Martin v. Williams*, 93 S.E.2d 835 (W. Va. 1956) (3-2 decision).

An examination of the facts in the opinion indicates the insufficiency of the other alleged grounds for relief, and reveals the apparent conclusion that the aesthetic argument was the major consideration relied upon by the court in reaching its decision. If it